

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)
)
Application of DCC PCS, Inc.)
File No. 0000365171)
)
Auction No. 35 – C & F Block Broadband PCS)

Order

Adopted: June 6, 2003

Released: June 12, 2003

By the Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 9, 2001, TPS Utilicom, Inc. (“TPS”) filed a Petition to Deny against the above-captioned application of DCC PCS, Inc. (“DCC”), with respect to twelve licenses in the C and F Block Broadband Personal Communications Services auction completed in early 2001 (“Auction No. 35”).¹ TPS challenges DCC’s qualifications as an “entrepreneur” eligible for licenses awarded in C block closed bidding² under the “grandfather” exception.³ TPS also contends that AT&T Wireless PCS Interests, LLC (“AT&T Wireless”) exerts both *de jure* and *de facto* control over DCC, rendering DCC ineligible as an

¹ See generally TPS’ Petition to Deny, filed March 9, 2001 (“Petition”). DCC was the winning bidder for fourteen licenses in Auction No. 35. TPS challenges DCC’s application only with respect to twelve of those licenses. See *id.* at 1.

² Licenses auctioned in closed bidding are available only to bidders qualifying as “entrepreneurs.” See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Further Notice of Proposed Rulemaking*, 15 FCC Rcd 9773, 9794, ¶ 42 (2000) (“*Further Notice*”) (stating that eligibility restrictions apply in closed bidding). See also TPS Utilicom, Inc., *Order*, 16 FCC Rcd 14835, 14836 n.11 (CWD Policy and Rules Br. 2001) (“*TPS Utilicom*”); Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266, 16282 ¶ 30 (2000) (“*Sixth Report and Order*”). The eligibility rules for C and F Block licenses subject to closed bidding define an “entrepreneur” as an auction applicant which, together with its affiliates and controlling interests, has had gross revenues of less than \$125 million in each of the previous two years and has total assets of less than \$500 million at the time the applicant’s short-form application (Form 175) is filed. 47 C.F.R. § 24.709(a)(1) (2000). See also 47 C.F.R. § 1.2110 (2000) (defining designated entities and setting forth attribution rules).

³ See 47 C.F.R. § 24.709(b)(9)(i-iii) (2000) (“grandfather” exceptions relating to eligibility for closed bidding for C Block licenses). In a subsequent revision of the Commission’s rules, these provisions were renumbered, without substantive changes. See Amendment of Parts 1, 21, 22, 24, 25, 26, 27, 73, 74, 80, 90, 95, 100 and 101 of Commission Rules --Competitive Bidding, *Order*, 17 FCC Rcd 6534 (2002); amended by *Erratum*, 17 FCC Rcd 11146 (2002) (“*Conforming Edits Order*”). For ease of reference, this Order will refer to the subsection numbering in effect at the time that DCC’s application and TPS’ Petition were filed, as cited in the Petition and DCC’s response thereto.

entrepreneur. Finally, TPS argues that DCC's "limited" disclosures in its application constitute a lack of candor that should disqualify DCC as a licensee.⁴

2. As explained below, we dismiss the Petition as moot as it relates to eleven of the twelve challenged licenses. As it relates to the one remaining challenged license, we dismiss TPS' Petition for lack of standing. Moreover, as discussed below, even were we to consider TPS' arguments, we would deny the Petition on the merits.

II. BACKGROUND

3. When the Commission instituted competitive bidding, as directed by Congress,⁵ it sought to ensure that small businesses would be provided an opportunity to participate in the wireless market.⁶ In keeping with this goal, the Commission set aside certain PCS licenses for businesses satisfying the entrepreneur eligibility criteria.⁷ In Auction No. 35, the Commission made certain C and F block licenses available in closed (i.e., entrepreneur-only) bidding only to applicants that met the financial limits on gross revenues and total assets set forth in the general entrepreneur eligibility rule.⁸ Applicants that exceeded the financial caps for entrepreneur eligibility under the general rule could still qualify under one of the then-applicable "grandfather" exceptions by showing that: (a) they had been deemed eligible for entrepreneur status in either of two earlier C Block auctions, Auction No. 5 or Auction No. 10, or (b) they are the resulting entity from a merger, acquisition, or other business combination of entities where each of the entities was deemed eligible for entrepreneur status in either Auctions Nos. 5 or 10, or where one or more of the entities were not deemed eligible for entrepreneur status in either Auctions Nos. 5 or 10 but an eligible entity possesses *de jure* and *de facto* control over the resulting entity.⁹

4. In Auction No. 35, DCC applied for entrepreneur eligibility status, submitting its short-form application on November 6, 2000.¹⁰ As part of its short-form application, DCC submitted information on matters related to its ownership (Exhibit A), its agreements with other parties (Exhibit B) and its entrepreneur eligibility (Exhibit C). DCC asserted that it was eligible for entrepreneur status because it

⁴ See generally Petition.

⁵ See Omnibus Budget Reconciliation Act of 1993 § 6002(a), 47 U.S.C. 309(j).

⁶ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349, 2350, 2388-89, ¶¶ 3, 6, 227-30 (1994) ("*Second Report and Order*"). See also 47 U.S.C. § 309(j)(3)(B) (objectives of competitive bidding include participation of small businesses).

⁷ See *Second Report and Order*, 9 FCC Rcd at 2392, ¶¶ 245-48. See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5539, 5584-88, ¶¶ 14, 118-27 (1994) ("*Fifth Report and Order*") (adopting competitive bidding rules for the award of Broadband PCS licenses).

⁸ See *supra* note 2. The Commission removed entrepreneur restrictions for some, but not all, licenses available in Auction No. 35. See 47 C.F.R. § 24.709(e) (2000); *Sixth Report and Order*, 15 FCC Rcd at 16276, ¶ 20 (explaining which licenses remained subject to entrepreneur eligibility restrictions, e.g., available only in closed bidding, and which ones were not subject to such restrictions, e.g., available in open bidding).

⁹ See 47 C.F.R. § 24.709(b)(9)(i-iii) (2000); *Sixth Report and Order*, 15 FCC Rcd at 16285-87, ¶¶ 38-42. Although other exceptions to the general eligibility rules were, at that time, unchanged in the Commission's rules, the Commission had previously indicated that those exceptions would not apply to Auction No. 35 or any future auctions. See Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15326-15327 ¶ 67 (2000). See also *Conforming Edits Order*, 17 FCC Rcd at 6542, ¶ 14 (modifying section 24.709 to clarify its applicability to existing licensees).

¹⁰ See DCC's Form 175 application (including exhibits), initially submitted on November 6, 2000, and resubmitted with updates on November 28, 2000.

had been eligible as an entrepreneur for and had participated in Auction No. 5.¹¹ Based on these submissions, DCC was deemed to be a “qualified” bidder for all 422 licenses auctioned in Auction No. 35, which included licenses subject to both closed and open bidding.¹²

5. TPS also applied for entrepreneur status in Auction No. 35.¹³ TPS was deemed a “qualified” bidder in twenty-three different markets, including eight involving C block licenses subject to closed bidding.¹⁴

6. Upon completion of Auction No. 35, which closed on January 26, 2001, DCC was the high bidder for C block licenses in fourteen markets, including twelve licenses that were auctioned in closed bidding.¹⁵ Of these particular twelve licenses, TPS was qualified to bid in the auction of only one of them, the one involving the license in BTA 438 (Syracuse, NY) (“Syracuse License”).¹⁶

7. On February 12, 2001, DCC filed its long-form application (FCC Form 601) for the fourteen licenses.¹⁷ It included exhibits providing specific information on its ownership (Exhibit A), its entrepreneur eligibility (Exhibit C), and its various agreements and instruments with other parties (Exhibit E).¹⁸ According to its application, DCC seeks to qualify for entrepreneur status based on the grandfather provisions in Section 24.709(b)(9)(i) of the Commission’s rules because DCC had been deemed eligible for and had participated in Auction No. 5.¹⁹ DCC asserts that the two parties that control DCC -- Dobson Communications Corporation (“Dobson Communications”) and Dobson CC Limited Partnership (“DCCLP”) -- are the same two parties that controlled it at the time of Auction No. 5.²⁰ DCC explains that it is a wholly-owned subsidiary of Dobson Communications, which owns 100 percent of the common stock of DCC, and which in turn is owned in majority by DCCLP, which holds approximately 81 percent

¹¹ *Id.*

¹² See Auction of Licenses for the C and F Block Broadband PCS Spectrum; 87 Qualified Bidders, *Public Notice*, 15 FCC Rcd 23887 (2000), at Attachment B (“*Qualified Bidders Public Notice*”).

¹³ See TPS’ Form 175 application (including exhibits, submitted November 6, 2000 and resubmitted on November 28, 2000).

¹⁴ See *Qualified Bidders Public Notice*. The licenses subject to closed bidding for which TPS was qualified to bid were in the following Basic Trading Areas (“BTA”): BTA 007 (two different blocks), BTA 043, BTA 127, BTA 208, BTA 333, BTA 438, and BTA 463. *Id.*

¹⁵ See C and F Block Broadband PCS Auction Closes, *Public Notice*, 16 FCC Rcd 2339, 2356-66 (2001) (“*Closing PN*”). The fourteen licenses, according to their BTAs, were: BTA 010, BTA 029, BTA 056, BTA 059, BTA 136, BTA 221, BTA 226, BTA 268, BTA 350, BTA 401, BTA 402, BTA 438, BTA 441, and BTA 461. The only two of these licenses not auctioned in closed bidding were those in BTA 136 and BTA 221. *Id.* The Petition does not challenge DCC’s application for those two licenses.

¹⁶ See *Qualified Bidders Public Notice*.

¹⁷ DCC’s Form 601 application originally was filed on February 12, 2001 but has been amended and supplemented since the initial filing. See ULS File No. 0000365171 (filed February 12, 2001, amended February 21, 2001, January 3, 2002, and November 14, 2002). (“DCC’s Form 601”).

¹⁸ See generally DCC’s Form 601. DCC filed a revised Exhibit A with the Commission on February 21, 2001 (hereinafter “Exhibit A”).

¹⁹ DCC’s Form 601, Exhibit C. DCC cites the Commission’s determination in 1995 that DCC was eligible for and participated as a small business in Auction No. 5 (*citing* *Qualified Bidders and Bidding Instructions for December 18, 1995 Broadband PCS C Block Auction, Public Notice*, Report No. AUC-95-05, Auction No. 5 (rel. Dec. 8, 1995) and <http://www.fcc.gov/wtb/auctions/> for Auction No. 5 round results indicating that DCC placed bids).

²⁰ DCC’s Form 601, Exhibit A at 2.

of the voting interest in Dobson Communications.²¹

8. In its long-form application, DCC also submitted information relating to a stock purchase agreement (“Stock Purchase Agreement”) that AT&T Wireless entered into with DCC’s parent corporation Dobson Communications on November 6, 2000, and which was consummated on February 8, 2001.²² Pursuant to this agreement, AT&T Wireless acquired \$200 million in convertible preferred stock (200,000 shares) in Dobson Communications in exchange for, among other things, Dobson Communications’ agreement -- under Section 5 -- to negotiate in good faith: (1) an operating agreement that would provide AT&T Wireless with access to DCC’s network; and (2) a branding agreement with AT&T Wireless that would be applicable to services provided using spectrum licensed to DCC.²³

9. Finally, DCC disclosed that Dobson Communications and AT&T Wireless entered into a memorandum of understanding (“MOU”) regarding their formation of a joint venture arrangement relating to provision of voice and data services using certain licenses obtained by DCC in Auction No. 35.²⁴ Pursuant to this MOU, in certain markets DCC and AT&T Wireless would each contribute at least one 10 MHz license to the joint venture, which then would manage the business and operations, using an agreed-upon brand name, under a management agreement. DCC asserted that Dobson Communications would maintain both *de jure* and *de facto* control of the venture.²⁵ The MOU had a termination clause stating that it would terminate “upon the earlier of the full execution of the definitive documents described under Section 5 [of the Stock Purchase Agreement] and the first anniversary of the date [of the MOU].”²⁶

10. DCC’s long-form application (along with other Auction No. 35 long-form applications) was placed on an Accepted for Filing Public Notice, dated February 27, 2001, which announced that petitions to deny had to be filed by March 9, 2001.²⁷

11. On March 9, 2001, TPS filed its Petition requesting that the Commission deny DCC’s application with regard to the twelve licenses auctioned in closed bidding.²⁸ Specifically, TPS argues that: (1) DCC misdirected the Commission to evaluate its application pursuant to the grandfather exception in section 24.709(b)(9)(i), when DCC instead would have to meet the grandfather exception set forth in section 24.709(b)(9)(iii), which required that DCC establish its qualifications pursuant to a *de jure* and *de facto* control analysis with regard to its “business combination” with AT&T Wireless, and

²¹ DCC’s Form 601, Exhibit A at 1.

²² DCC’s Form 601, Exhibits A and E.

²³ See November 6, 2000, Stock Purchase Agreement Between AT&T Wireless Services, Inc. and Dobson Communications Corporation at Section 5. Dobson and AT&T Wireless also agreed that AT&T Wireless would obtain the right of first refusal if DCC desired to sell, transfer, or assign the licenses it obtained in Auction No. 35.

²⁴ DCC’s Form 601, Exhibit E.

²⁵ *Id.* On February 23, 2001, in response to an inquiry by Commission staff, DCC forwarded to the Commission (1) a copy of the November 6, 2000 Stock Purchase Agreement, (2) the November 6, 2000 MOU, and (3) the agreement relating to the right of first refusal. See November 30, 2001 letter from DCC counsel Lawrence J. Movshin to Linda Ray of the Commercial Wireless Division at 1 n.1 (discussing various DCC submissions).

²⁶ MOU at ¶ 8.

²⁷ See C and F Block Broadband Personal Communications Services (PCS) Auction; Applications Accepted for Filing, *Public Notice*, 16 FCC Rcd 4742, 4742 (2001); see also 47 C.F.R. § 1.2108 (requirements for petitions to deny).

²⁸ Although TPS did not identify the twelve particular licenses according to their BTAs, those licenses are in the following BTAs: BTA 010, BTA 029, BTA 056, BTA 059, BTA 226, BTA 268, BTA 350, BTA 401, BTA 402, BTA 438, BTA 441, and BTA 461. See *Closing PN*, 16 FCC Rcd at 2356-66.

that this business combination vested *de facto* control of DCC with AT&T Wireless;²⁹ (2) AT&T Wireless might hold *de jure* control over DCC, based on DCC's limited disclosure in its short-form application with regard to the Stock Purchase Agreement and the power to control conferred on AT&T Wireless in that agreement;³⁰ (3) DCC's commitment to negotiate a joint venture arrangement with AT&T Wireless concerning the operations, standards, branding, management, roaming, and certain pricing derived from various of DCC's licenses won at Auction No. 35 gave AT&T Wireless *de facto* control of DCC's licenses;³¹ and (4) DCC's submission in its short-form application (FCC Form 175) was insufficient to provide the basis for appropriate control analysis, such that DCC's application should be denied for lack of candor.³²

12. DCC filed an Opposition to the Petition to Deny on March 16, 2001.³³ In its Opposition, DCC argues that TPS failed to establish its standing to challenge the grant of the affected licenses.³⁴ DCC again asserts that its entrepreneur eligibility was established pursuant to section 24.709(b)(9)(i), based on DCC's earlier qualification as an entrepreneur and participant in Auction No. 5, and states that even if section 24.709(b)(9)(iii) were the appropriate provision, DCC nonetheless still qualified as an entrepreneur because control of DCC had not changed since Auction No. 5.³⁵ DCC also contends that TPS failed to demonstrate that AT&T Wireless was in either *de jure* or *de facto* control of DCC.³⁶ Finally, DCC argues that it complied with all of the Commission's disclosure requirements regarding ownership issues when it submitted both its short- and long-form applications.³⁷

13. DCC later informed the Commission that the MOU between AT&T Wireless and Dobson Communications concerning use of DCC licenses won in Auction No. 35 had expired by its terms and that there were no new agreements between AT&T Wireless and Dobson Communications affecting any licenses won by DCC in Auction No. 35. DCC stated further that Dobson Communications and AT&T Wireless had not entered into either the operating agreement or the branding agreement contemplated in Section 5 of the Stock Purchase Agreement.³⁸

14. On November 14, 2002, the Commission announced that it would allow eligible winners in Auction No. 35 to request the dismissal of their pending applications for C and F block PCS licenses for spectrum that previously had been licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc. or UrbanComm-North Carolina, Inc.³⁹ DCC filed a request that its pending

²⁹ Petition at 1-2.

³⁰ *Id.* at 3-4.

³¹ *Id.* at 4-5.

³² *Id.* at 2-3, 5.

³³ See generally DCC's Consolidated Opposition to Petitions to Deny and Comments on Petitions to Defer or, in the Alternative, to Condition Grant, filed March 16, 2001 (responding to TPS' Petition as well as another party's petition to deny regarding these licenses) ("DCC Opposition").

³⁴ DCC Opposition at 4 n.4.

³⁵ *Id.* at 4-6.

³⁶ *Id.* at 6-8.

³⁷ *Id.* at 9-10.

³⁸ See Letters, dated October 17, 2002, and October 24, 2002, from Lawrence J. Movshin, Counsel for DCC, to Linda Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau.

³⁹ See In the Matter of Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35, Requests for Refunds of Down Payments Made in Auction No. 35, *Order and Order on Reconsideration*, 17 FCC Rcd 23354 (2002).

application for eleven C and F block PCS licenses be dismissed.⁴⁰ The Wireless Telecommunications Bureau reviewed DCC's request and granted the dismissal of DCC's application for those licenses.⁴¹ As DCC elected to dismiss its application for eleven of the twelve licenses that it won in closed bidding in which only entities qualifying as entrepreneurs could participate, TPS' challenge of DCC's application for those eleven licenses is now moot. Thus, we consider the Petition only as it pertains to the application for the one challenged license that remains pending -- the Syracuse License.⁴²

III. DISCUSSION

A. Standing

15. As explained above,⁴³ DCC's application for eleven of the challenged licenses has been dismissed, and we accordingly dismiss the Petition as moot as it pertains to those licenses. As to the one remaining license at issue, we determine, for the reasons discussed below, that TPS lacks standing to file a petition to deny DCC's application for the Syracuse License, and we accordingly dismiss the Petition on that ground, to the extent that it is not moot.

16. In order to establish standing to file a petition to deny, a petitioner must demonstrate that it is a "party in interest," as required by Section 309(d)(1) of the Communications Act, as amended.⁴⁴ In particular, a petitioner must make specific allegations of fact sufficient to demonstrate that grant of the challenged application would cause the petitioner to suffer a direct injury.⁴⁵ Additionally, a petitioner must establish a causal link between the claimed injury and the challenged action by demonstrating that the injury can be traced to the challenged action and that the injury would be prevented or redressed by the relief requested.⁴⁶

17. TPS makes no attempt to explain how it satisfies the general requirements for standing. TPS fails either to argue in its Petition that it has standing or to set forth sufficient facts establishing that grant of the Syracuse License to DCC would cause TPS direct injury. Additionally, TPS fails to allege, much

⁴⁰ See DCC's Form 601, Dismissal Request, filed November 14, 2002.

⁴¹ See Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 12 C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, DA 02-3288, at 1, Attachment A (rel. Nov. 26, 2002). DCC's application was dismissed with respect to licenses in the following markets: BTA 010, BTA 029, BTA 056, BTA 059, BTA 226, BTA 268, BTA 350, BTA 401, BTA 402, BTA 441 and BTA 461. All eleven of those licenses were auctioned in closed bidding and accordingly were subject to the Petition.

⁴² DCC's application also remains pending for two licenses auctioned in open bidding -- those for BTA 136 and BTA 221. Those licenses are not subject to the Petition.

⁴³ See *supra* paragraph 14.

⁴⁴ 47 U.S.C. § 309(d)(1). See *Minnesota PCS Limited Partnership, Order*, 17 FCC Rcd 126, 128, ¶ 6 (CWD 2002) ("*Minnesota PCS*"); *Black Crow Wireless, L.P., Order*, 16 FCC Rcd 15643, 15644-45, ¶ 4 (CWD Policy and Rules Br. 2001) ("*Black Crow*"); *Applications of ABC Wireless, L.L.C., Order*, 15 FCC Rcd 6787, 6789, ¶ 4 (CWD Policy and Rules Br. 1999) ("*ABC Wireless*"); *Application of Los Angeles Cellular Telephone Company, Order*, 13 FCC Rcd 4601, 4603-04, ¶ 5 (CWD 1998) ("*Los Angeles Cellular*").

⁴⁵ See *Minnesota PCS*, 17 FCC Rcd at 128, ¶ 6; *Black Crow*, 16 FCC Rcd at 15644-45, ¶ 4; *ABC Wireless*, 15 FCC Rcd at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd at 4603-04, ¶ 5; *Americatel Corporation, Memorandum Opinion, Order, Authorization and Certificate*, 9 FCC Rcd 3993, 3995, ¶ 9 (1994) ("*Americatel Corporation*"); see also *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 73-74 (1978) ("*Duke*"); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

⁴⁶ See *Americatel Corporation*, 9 FCC Rcd at 3995, ¶ 9; *Black Crow*, 16 FCC Rcd at 15645, ¶ 4; *ABC Wireless*, 15 FCC Rcd at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd at 4603-04, ¶ 5; see also *Duke*, 438 U.S. at 72, 74, 78, 81.

less demonstrate, that the award of the license to DCC would somehow deprive TPS of a valid auction process.⁴⁷ In the market for the Syracuse License, there were multiple auction participants, not just DCC. Commission records show that entities in addition to DCC continued to place bids after TPS submitted its last bid.⁴⁸ TPS, therefore, ultimately was outbid not just by DCC but also by 3DL and Alaska Native Wireless. TPS has not challenged the eligibility of 3DL. Moreover, while TPS did file a petition to deny challenging the eligibility of Alaska Native Wireless, that challenge, even if it had been successful,⁴⁹ would not establish TPS' standing to challenge DCC's application. Accordingly, TPS has not shown how it would suffer a direct injury from the grant of the license to DCC, the high bidder, because other entities continued to bid on the license after TPS placed its final bid. For the same reasons, TPS has not shown that denying DCC the license would redress any injury allegedly suffered by TPS, because TPS would not have been awarded the license in any event. Accordingly, we will dismiss the Petition for lack of standing.

B. Substantive Issues

18. Even if we were to address the Petition on the merits, we would deny it. TPS has not alleged any facts demonstrating that DCC fails to qualify as an entrepreneur under the "grandfather" provisions or that AT&T Wireless is a controlling interest of DCC. Additionally, TPS has not raised any facts demonstrating that DCC acted with a lack of candor in filing its Auction No. 35 applications that would make it ineligible to be a Commission licensee.

1. Qualification Under the "Grandfather" Provisions

19. In its application, DCC asserts that, pursuant to section 24.709(b)(9)(i), it was qualified to bid in the auction for licenses subject to closed bidding because it previously had been deemed eligible for Auction No. 5.⁵⁰ TPS, however, alleges that what it terms DCC's "business combination" with AT&T Wireless, in which DCC would receive \$200 million from AT&T Wireless "in exchange for significant concessions" as well as a right of first refusal if DCC sought to sell its licenses, requires that the Commission evaluate DCC's entrepreneur status pursuant to section 24.709(b)(9)(iii) by examining whether AT&T Wireless has *de jure* or *de facto* control of DCC.⁵¹

20. Were we to address the Petition on the merits, we would not conclude that DCC is not qualified as an entrepreneur under the "grandfather" provisions set forth in section 24.709(b)(9)(i) of the Commission's rules. We would agree with DCC that its status as an entrepreneur should be determined by application of Section 24.709(b)(9)(i). What TPS terms a "business combination" in fact involves AT&T Wireless' investment in DCC's parent corporation Dobson Communications under the Stock Purchase Agreement.⁵² By its very terms, section 24.709(b)(9)(iii) addresses how the grandfather exception would apply in "cases of merger, acquisition, or business combination of entities, where one or

⁴⁷ See *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002).

⁴⁸ Commission records of the bidding in Auction No. 35 for the Syracuse license show that TPS' last bid was in round 10. Later bids for the license were made by 3DL Wireless, LLC ("3DL"), in round 13, and Alaska Native Wireless, L.L.C. ("Alaska Native Wireless"), in round 14. DCC was the high bidder for the license, in round 18.

⁴⁹ TPS' petition to deny Alaska Native Wireless' applications in Auction No. 35 was dismissed by the Wireless Telecommunications Bureau ("Bureau"). See *Applications of Alaska Native Wireless, L.L.C., Order*, 17 FCC Rcd 4231 (WTB 2002) ("*Alaska Native Wireless*"). The Commission recently affirmed the Bureau's dismissal of TPS' petition. See *Applications of Alaska Native Wireless, L.L.C., Order*, FCC 03-121 (rel. June 3, 2003).

⁵⁰ DCC's Form 601, Exhibit C.

⁵¹ Petition at 1-2.

⁵² *Id.* at 2.

more of the entities are ineligible for the [grandfather] exception [granted to those entities that were eligible for and participated in Auction No. 5 or Auction No. 10].”⁵³ AT&T Wireless’ equity interest in Dobson Communications acquired under the Stock Purchase Agreement does not constitute a merger, acquisition, or business combination as contemplated by this rule subsection.⁵⁴

21. In evaluating DCC’s application pursuant to section 24.709(b)(9)(i), we nonetheless would need to determine whether the parties that controlled the DCC entity that participated in Auction No. 5 are the same parties that control DCC in its pending application.⁵⁵ In particular, we still would need to evaluate whether AT&T Wireless exerts either *de jure* or *de facto* control of DCC, as alleged by TPS.

22. DCC states in its application in Auction No. 35 that the two parties that control it -- Dobson Communications and its majority owner DCCLP -- are the same parties that controlled DCC at the time of Auction No. 5.⁵⁶ Specifically, with regard to direct ownership, DCC states that it is a wholly-owned subsidiary of Dobson Communications, which owns 100 percent of DCC’s common stock, and that no other party directly holds a 10 percent or greater share in DCC. As regards indirect ownership, DCC states that Dobson Communications is owned in majority by DCCLP, which currently holds approximately 81 percent of the voting interest in Dobson Communications, and that no other party holds as much as a 10 percent interest in Dobson Communications.⁵⁷

23. DCC asserts, further, that AT&T Wireless’ Stock Purchase Agreement with Dobson Communications does not provide AT&T Wireless with control of DCC. DCC explains that the stock purchase agreement, which ultimately was consummated on February 8, 2001, involved AT&T Wireless’ purchase of 200,000 shares of Dobson Communications’ Series AA Preferred Stock, a class of non-voting preferred stock. DCC asserts that even were AT&T Wireless to convert all of this stock into common stock, AT&T Wireless’ total outstanding stock in Dobson Communications would amount to approximately 12.2 percent of the equity of Dobson Communications on an “as issued” basis, and approximately 11.7 percent of the equity on a fully diluted basis -- representing approximately 5.9 percent of the voting power of all classes of stock in Dobson Communications. In sum, DCC states, even after such an increase in AT&T Wireless’ ownership, DCCLP still would own approximately 51.9 percent of the equity interest and control approximately 80 percent of the voting interests of all classes of stock in Dobson Communications.⁵⁸

24. The Commission’s rules state that *de jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests.⁵⁹ Thus, *de jure* control is established only by ownership of more than 50 percent of an entity’s *voting* interests.⁶⁰ As Dobson Communications owns 100 percent of DCC’s common stock and DCCLP retains

⁵³ See 47 C.F.R. § 24.709(b)(9)(iii) (2000).

⁵⁴ *Id.* See *Sixth Report and Order*, 15 FCC Rcd at 16286-87, ¶¶ 39-42; *Further Notice* 15 FCC Rcd at 9792-93, ¶¶ 37-38.

⁵⁵ See 47 C.F.R. § 24.709(b)(9)(i) (2000); *Sixth Report and Order*, 15 FCC Rcd at 16282, ¶ 30. See also 47 C.F.R. § 1.2110 (defining controlling interests).

⁵⁶ DCC’s Form 601, Exhibit A at 1-3. TPS does not dispute that DCC was controlled by Dobson Communications and DCCLP at the time of Auction No. 5.

⁵⁷ DCC’s Form 601, Exhibit A at 1-3.

⁵⁸ DCC’s Form 601, Exhibit A at 4-5.

⁵⁹ 47 C.F.R. § 1.2110(c)(2).

⁶⁰ See GTE Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, 14075, ¶ 76 & n.198 (2000); Application of Baker Creek Communications, L.P., *Memorandum Opinion and Order*, 13 FCC Rcd 18709, 18712, ¶ 6 (PSPWD 1998); see also Fox Television Stations, Inc., *Memorandum Opinion and Order*, 10 FCC Rcd 8452,

(continued....)

approximately 80 percent of the voting stock of Dobson Communications after giving full effect to AT&T's conversion rights, we would not find persuasive, were we to consider it, TPS' suggestion that AT&T Wireless may have *de jure* control over DCC because of the alleged power conferred on AT&T Wireless in the Stock Purchase Agreement.⁶¹

25. We also would not be persuaded by TPS' contention that AT&T Wireless has *de facto* control of DCC on the basis of the agreement in the MOU to enter into a joint venture arrangement relating to certain licenses won by DCC in Auction No. 35.⁶² As discussed above, DCC has informed the Commission that the MOU has expired and had not been replaced with any similar agreement.⁶³ Accordingly, TPS' *de facto* control arguments based on the MOU are now moot, and if we were to consider the Petition on the merits, we would not conclude that it offers any other basis for finding that AT&T Wireless has *de facto* control over DCC.

2. Limited Disclosure/Lack of Candor

26. Finally, TPS argues that DCC's application should be denied for lack of candor because DCC's submission in its short-form application was insufficient to provide the basis for appropriate control analysis.⁶⁴ We would not agree. The Commission adopted a two-phased approach to the review of auction applications and winning bidders' qualifications.⁶⁵ In the first phase, the Bureau reviews each short-form application to ensure compliance with the Commission's rules.⁶⁶ By submitting the short-form application, applicants declare, under penalty of perjury, that "... all matters and things stated in [the] application and attachments, including exhibits, are true and correct."⁶⁷ Following close of the auction, winning bidders are required to submit a long-form application, and the second phase of the review commences. In adopting this two-phased approach, the Commission balanced the importance of limiting participation in its auctions to those entities that are legally, technically, and financially qualified to hold a Commission license with the need to conduct auctions expeditiously.⁶⁸

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8513, ¶ 151 (1995); C and F Block Broadband PCS Spectrum Auction Scheduled For December 12, 2000, *Public Notice*, 15 FCC Rcd 19485, 19500 (2000).

⁶¹ See Petition at 3.

⁶² See *id.* at 4-5; DCC's Form 601, Exhibit E.

⁶³ See *supra* paragraph 13.

⁶⁴ TPS Response at 2. See also Petition at 5-6.

⁶⁵ Implementation of Section 309(j) of the Communications Act — Competitive Bidding, MM Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2376, ¶ 163 (1994); Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum, *Order*, 17 FCC Rcd 19746, 19749-50, ¶ 7 (2002) (explaining the two-phased review process in detail).

⁶⁶ Mr. Steven R. Sixberry, DA 00-1949, *Letter*, 15 FCC Rcd 15958 (2000) ("*Nevada Wireless Letter*") ("Absent substantiated evidence of wrongdoing, . . . it is more prudent to address [designated entity eligibility] allegations after the winning bidders have submitted their long-form applications"). In reviewing the short-form applications, the information and certifications contained in the short-form applications are presumed to be true unless they are incomplete, internally inconsistent, or contradicted by information in the Commission's records. *Id.*

⁶⁷ FCC Form 175.

⁶⁸ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶¶ 200-01; Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, Proposals to Reform the Commission's Comparative Hearing Process to Expedite

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27. In the instant case, DCC disclosed the existence of AT&T Wireless' interests in its short-form application as well as in its long-form application.⁶⁹ As noted above, under the Commission's two-phased approach to the review of auction applications, the full review of eligibility issues takes place in the second phase, after the long-form applications are filed.⁷⁰ The possibility always exists that the Bureau may determine during the second phase that an interest an applicant has disclosed as non-controlling is, in fact, controlling. Under such a scenario, the applicant's failure to satisfy the controlling interest standard would not automatically compel a finding that the applicant lacked candor.⁷¹ Thus, were we to consider TPS' Petition on the merits, we would not be persuaded by TPS' arguments that DCC displayed a lack of candor in its short-form application such as to disqualify it as a licensee.

IV. CONCLUSION

28. For the reasons discussed above, we dismiss the TPS Petition as moot and, to the extent that it is not moot, for lack of standing. As further discussed above, were we to consider the Petition on the merits, we would deny it.

V. ORDERING CLAUSE

29. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 309(d)(1) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(1), 309(j), and sections 0.331, 1.2108 and 24.830 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.2108, 24.830, the Petition to Deny filed by TPS Utilicom, Inc. on March 9, 2001 is hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Linda C. Ray
Deputy Chief, Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau

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the Resolution of Cases, GEN Docket No. 90-264, *First Report and Order*, 13 FCC Rcd 15920, 15953, ¶ 90 (1998) ("We believe that the time and expense entailed in adjudicating fully all unresolved issues relating to the basic qualification issues as to all pending applicants would greatly exceed any additional delay that might result from the eventual disqualification of a winning bidder. For these reasons, we find that deferring consideration of basic qualifying issues until after the auction is fairer and ultimately more efficient than resolving any issues relating to the basic qualification of all pending applicants. . .").

⁶⁹ DCC also provided additional information and documents regarding the ownership and organization of DCC in response to staff inquiries during the long-form review process.

⁷⁰ See *supra* note 65 and accompanying text.

⁷¹ See *Alaska Native Wireless*, 17 FCC Rcd at 4241, ¶ 20.